

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 61521-1-I
)	
Respondent,)	
)	
v.)	
)	
KONSTANTINO A. CHRISTOFILIS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 15, 2009
)	

Ellington, J. — Limitations upon the scope of cross-examination in this case did not violate the right to confrontation and were not an abuse of discretion. Nor did the court commit reversible error in its rulings on evidence. We therefore affirm the appellant's convictions for possession of cocaine with intent to deliver and unlawful possession of a firearm.

FACTS

On May 13, 2007, a neighbor called 911 and reported an apparent burglary at Konstantino Christofilis's residence. When officers arrived, the front door appeared to have been kicked in, lights were on and the house looked ransacked. Officers entered with guns drawn and searched for suspects or victims, but found the house unoccupied. While securing the premises, they noticed a white residue covering a

table in the garage. A field test indicated the substance was cocaine.

The officers obtained a search warrant and returned. A lease found in the garage listed Christofilis and Tiffany Underwood as tenants. In the garage, on a four foot by two foot table covered with residue, officers found packaging material, including baggies and plastic wrap. Newport cigarettes and a lady's locket were found on or under the table. A box next to the table contained almost a half kilogram of cocaine, a nine millimeter Glock firearm, a .380 caliber Bersa firearm, and personal items belonging to Christofilis and Underwood. Documents in the box bore Underwood's name. A purse found in the garage contained .380 caliber ammunition.

In a bedroom closet containing only men's clothing, officers found documents bearing Christofilis's name dated March 16, 2007 and April 30, 2007. Also in the closet were a safe and gun safe manual, a "Glock" gun bag, a holster, several loaded handgun magazines containing nine millimeter and .380 caliber ammunition, and Newport cigarettes. The safe contained a silencer and Christofilis's checkbook.

While officers were at the scene, Underwood drove past the house twice at a high rate of speed. On her second pass, the police stopped and arrested her. She denied living at the house or receiving mail there. She stated that "[Christofilis] ought to be where I am right now."¹

The State charged Underwood and Christofilis with possession of cocaine with intent to deliver, and also charged Christofilis with unlawful possession of a firearm. Underwood pleaded guilty to a reduced charge of simple possession. Christofilis

¹ Report of Proceedings (RP) (Feb. 5, 2008) at 225.

pleaded not guilty and proceeded to trial.

Prior to trial, the State moved to exclude any evidence of Underwood's unrelated convictions for delivery of a controlled substance, contending the evidence had no purpose other than to show Underwood's propensity to commit the crime for which Christofilis was being tried and was not otherwise admissible under ER 609. Defense counsel maintained the evidence was relevant to show the cocaine could have been Underwood's. The court excluded the evidence, but ruled that the defense could question Underwood about her guilty plea to possession of the drugs in the residence and her knowledge of drugs and drug dealing.

At trial, officers testified to the details of their search and the evidence recovered from the residence. Underwood testified that she had a romantic relationship with Christofilis for two and half years and had lived with him for seven months at the north Seattle residence, where they each had their own closets and both used the garage for storage. She denied any knowledge of a safe or guns. She testified that Christofilis sometimes entered the house through the garage, but she used the front door.

According to Underwood, Christofilis paid the rent but had no daily schedule and, as far as she knew, did not have a job. Underwood testified she did not smoke and Christofilis smoked Newport cigarettes. She admitted pleading guilty to possession of cocaine after the drugs were found in the house, but she denied having any knowledge of the drugs. She also admitted telling police during her arrest that "[Christofilis] ought to be where I am right now."² Although the reconstructed record³ is

² Id.

not entirely clear, it appears the defense objected to this testimony as an opinion on guilt but the objection was overruled.

On cross-examination, Underwood conceded she once smoked Newports, but claimed she no longer smoked. She denied problems in her relationship with Christofilis or being charged with domestic violence against him. The defense later sought permission to impeach Underwood with a copy of the domestic violence conviction, but the court excluded it.

Underwood also denied having a second boyfriend, Carl Pierce, during the period in question but admitted visiting Pierce in the King County jail. When asked if the drugs in the house belonged to her and Pierce, Underwood said, “No.”⁴ Defense counsel then asked if she had “some familiarity with the drug business . . . [t]he buying and selling of illegal drugs.”⁵ Underwood again said, “No.”⁶ The prosecutor requested a sidebar, but the court said, “No. The answer was no. It’ll stand. Next question.”⁷ Defense counsel then asked, “Isn’t it true that you’ve previously sold drugs?”⁸ The State objected, and the court, after sustaining the objection, invited defense counsel to make a record outside the presence of the jury. Defense counsel explained that

³ Portions of Underwood’s direct and cross-examination were not recorded due to a malfunction in the recording system. The parties reconstructed the record at a hearing and have provided this court with a transcript of that hearing. Christofilis has not challenged the reconstructed record.

⁴ RP (Feb. 5, 2008) at 141.

⁵ Id. at 141–42.

⁶ Id. at 142.

⁷ Id.

⁸ Id.

No. 61521-1-I/5

Underwood had been convicted of selling drugs to a police officer within the past 14

months and that the conviction impeached her testimony that she was not familiar with the drug business. After noting that counsel asked the drug business question with full knowledge of the court's pretrial ruling excluding evidence of the prior convictions, the court adhered to its prior ruling and instructed the jury to disregard the last question.

Following Underwood's testimony, Detective Richard Huntington testified that after he arrested and handcuffed Underwood, she said, "Dino [Christofilis] should be where [I am] right now . . . in handcuffs."⁹ Defense counsel objected on hearsay grounds, but the objection was overruled. Later, outside the presence of the jury, defense counsel reiterated his hearsay objection and argued that the statement was also an improper opinion on guilt. The court adhered to its ruling.

Huntington further testified that in his experience as a narcotics detective, 458 grams is a large amount of cocaine. By comparison, a street level purchase of cocaine would weigh anywhere from .2 to .4 grams.

The defense rested without calling any witnesses. During closing arguments, counsel focused on Underwood's credibility and the physical and circumstantial evidence linking Christofilis to the garage. The prosecutor argued in part that the physical evidence, including the large amount of cocaine, the residue spread across the table, the packaging material, and the nearby guns demonstrated that the cocaine was not possessed for personal use, but rather was possessed with intent to deliver. The jury convicted Christofilis as charged. He appeals.

DECISION

⁹ Id. at 225.

Christofilis first contends the trial court violated his right to confrontation when it precluded him from asking Underwood about her recent drug convictions and a false statement she allegedly made in another proceeding. We conclude the trial court's rulings did not violate Christofilis's right of confrontation.

The Sixth Amendment and the Washington Constitution, article I, section 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses.¹⁰ The right is not unlimited, however. The right to confrontation guarantees “an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”¹¹ The evidence introduced must be relevant, and the defendant's need for the evidence is to be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.¹² Ultimately, the scope of cross-examination is within the trial court's discretion, and a ruling limiting cross-examination will not be reversed absent a manifest abuse of discretion.¹³

Christofilis contends Underwood's delivery convictions were relevant to the defense theory of the case, *i.e.*, that the drugs could have been Underwood's and not

¹⁰ State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994).

¹¹ Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (emphasis omitted) (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)).

¹² State v. Hudlow, 99 Wn.2d 1, 15–16, 659 P.2d 514 (1983); State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

¹³ ER 611(b); Darden, 145 Wn.2d at 619; State v. McDaniel, 83 Wn. App. 179, 184–85, 920 P.2d 1218 (1996).

his. But to the extent the convictions tended to show the drugs belonged to Underwood, the evidence was of minimal relevance, because if it tended to make her involvement with the drugs more likely, it did nothing to make Christofilis's involvement less likely.

Christofilis further argues that Underwood was a crucial witness for the State, "was the only witness" who could establish that he possessed the drugs and intended them for delivery, so that limiting his ability to impeach her violated his right to confrontation.¹⁴

We must disagree. Christofilis does not dispute that the convictions were inadmissible under the rules of evidence. Otherwise inadmissible evidence of prior convictions is admissible for confrontation purposes if the witness's testimony provides "a crucial link in the proof" against the defendant.¹⁵ Viewing Underwood's testimony in the context of the State's entire case, the trial court could have reasonably decided her testimony was not a crucial link in the State's proof.

Underwood's testimony was not the only, or even the best, evidence linking him to the cocaine. The centerpiece of the State's case was the physical evidence. In the closet containing only a man's clothing, police found Newport cigarettes, documents bearing Christofilis's name, and ammunition and gun paraphernalia indisputably linked to the guns found next to the cocaine in the garage. Evidence from the closet thus

¹⁴ Appellant's Br. at 27.

¹⁵ State v. Briggs, 55 Wn. App. 44, 67, 776 P.2d 1347 (1989) (quoting Davis v. Alaska, 415 U.S. 308, 317, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)); McDaniel, 83 Wn. App. at 179 n.5.

linked Christofilis directly to the cocaine. Underwood's testimony provided additional circumstantial evidence of that connection, but the trial court could reasonably have concluded it did not provide a crucial link in the proof.

Nor was Underwood's testimony the only or the best evidence of possession with intent to deliver. The amount of cocaine, the packaging material, the guns, the residue spread across the entire surface of the table, and Detective Huntington's testimony strongly established that whoever possessed the cocaine intended to deliver it.

Finally, Underwood's credibility was impeached by her own actions and prior false statements. She admitted she sped past the residence and then lied to police. The jury also knew that, despite her claim that she was unaware of the cocaine in the garage, she pleaded guilty to possessing it, and her claimed ignorance about the drugs and guns was undermined by evidence of the locket and the purse. There was thus plentiful opportunity for the defense to challenge Underwood's credibility.¹⁶ Although the delivery convictions may have had some additional impeachment value, they were hardly necessary for that challenge. And as the court pointed out, the defense created the opening knowing the court had declined to authorize it.

Considering all the circumstances, we conclude that the trial court's limitation on Underwood's cross-examination was within its discretion and did not violate Christofilis's right to confrontation.

¹⁶ State v. Barnes, 54 Wn. App. 536, 539–41, 774 P.2d 547 (1989) (availability of other impeachment evidence is a factor that may justify limiting cross-examination).

Christofilis also argues in conclusory fashion that the court denied his right to confront Underwood when it excluded evidence that she allegedly lied about where she lived during unrelated proceedings in drug court. Because there was no showing that the statement was made under oath, and because Christofilis had other strong impeachment, we cannot say the court abused its discretion in excluding the evidence.¹⁷

Christofilis next assigns error to the admission of testimony from Underwood and Detective Huntington as to Underwood's statement that "[Christofilis] ought to be where I am right now." In his argument, however, Cristofilis focuses exclusively on Huntington's testimony, and his brief contains virtually no argument regarding Underwood's testimony about the same statement.¹⁸ We therefore do not consider it.¹⁹

In any event, Christofilis's characterization of the statement as an impermissible opinion on guilt is not persuasive.²⁰ The general rule is that no witness may offer an opinion regarding the defendant's guilt because such opinions invade the province of the jury.²¹ Washington courts have expressly declined to take an expansive view of

¹⁷ State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (specific instances of lying may be admitted whether sworn or unsworn, but their admission is highly discretionary).

¹⁸ Despite the trial court's finding to the contrary, Christofilis claims in his opening brief that "the State entered the statements through Officer Huntington rather than directly through Tiffany Underwood." Appellant's Br. at 40.

¹⁹ State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims insufficiently argued); State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (without argument or authority to support it, an assignment of error is waived).

²⁰ We note that Christofilis does not claim to have objected to Underwood's testimony concerning her prior statement on any other basis.

claims that testimony constitutes an opinion on guilt.²² Whether testimony constitutes an impermissible opinion on guilt will generally depend on the record and the circumstances of each case.²³

Here, the statement came on the heels of Underwood's denial that she lived in or received mail at the residence, and could reasonably be seen as just another attempt by Underwood to deflect blame. Second, given Underwood's relationship to the defendant and the house, the statement could be interpreted as a statement of fact rather than opinion. This is not a circumstance where a witness without personal knowledge has opined about a defendant's mental state.²⁴

Given the narrow approach our courts have taken to opinions on guilt, the court did not abuse its discretion in overruling the objection to Underwood's statement as an opinion on guilt.

Christofilis argues in the alternative that Detective Huntington's repetition of Underwood's statement was inadmissible hearsay. We need not decide whether the testimony was admissible because any error in admitting it was harmless. An evidentiary error is harmless if, within reasonable probabilities, the outcome of the trial would not have been materially affected absent the error.²⁵ As discussed above,

²¹ City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

²² Heatley, 70 Wn. App. at 579.

²³ Id.

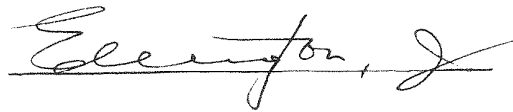
²⁴ See, e.g., State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008); State v. Farr-Lenzini, 93 Wn. App. 453, 459–60, 970 P.2d 313 (1999).

²⁵ State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

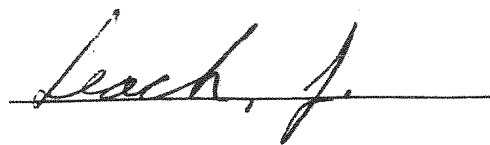
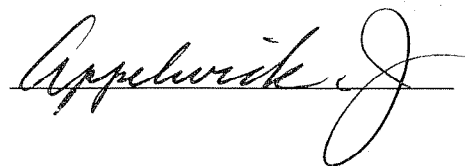
Underwood had already testified to the same statement prior to Huntington's testimony. There is no reasonable probability that the admission of this cumulative testimony affected the outcome of the trial.²⁶

Last, Christofilis contends his trial violated article I, sections 21 and 22 of the Washington Constitution because the jury source list statute, RCW 2.36.055, and King County Local General Rule 18(e) allowed his jury to be drawn from only a portion of King County. The Washington State Supreme Court recently rejected an identical argument in State v. Lanciloti, 165 Wn.2d 661, 663, 201 P.3d 323 (2009).

Affirmed.

A handwritten signature in cursive script, appearing to read "E. E. Huntington, Jr.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Leach, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Appelwick, J.", written over a horizontal line.

²⁶ State v. Acheson, 48 Wn. App. 630, 635, 740 P.2d 346 (1987) (erroneous admission of evidence is harmless if it is merely cumulative of properly admitted evidence).